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THE CRIMINAL CODE OF THE NORTHWEST TERRITORY

By the Late Judge DAVID D. BANTA, Sometime Dean of the Indiana
University Law School

[Judge Banta was born in Johnson county, May 23, 1833. He was educated at Franklin College and Indiana University, graduating from the latter institution with the class of 1855. Two years later he graduated from the Law School of Indiana University. In 1888 Hanover College conferred upon him the honorary degree of LL.D. He was in public service continuously from 1857 to his death in 1896, during the last six years of his life being Dean of the School of Law of Indiana University. He was the author of a *History of Johnson County*, *History of the Presbyterian Church of Franklin*, *Making a Neighborhood*, and many shorter papers and essays. This paper was read before the Fortnightly Club of Bloomington on May 2, 1892.]

WHEN the immortal Diedrich Knickerbocker sat down to write his veracious History of New York, he began his story with an account of the creation of the world. With less time at my command in which to write my history and moved by a less lofty ambition than that which animated the great Dutch author, I begin at an era, which, if of less consequence to the world in general than the creation, is scarcely less so to that part of the world which is comprised within the boundaries of the old Northwest territory; and which it must be confessed by all has the merit of being closer to us in point of time than does the creation. I refer to the Ordinance of 1787.

This old document, about which so many fine things have been spoken by our historians and orators, can not be passed over, at least without mention by one in search of the genesis of the Indiana criminal code, for it was in the very next year after the passage of the Ordinance that the government of the Northwest territory was set up at Marietta, at the mouth of the Muskingum, and a code of laws was enacted in pursuance of its provisions for the government of the people northwest of the Ohio. That first code, together with such additions as were from time to time made to it by the different legislative bodies, constituted the code and of course the criminal code in force in the Indiana territory when in 1816 that territory became the State of Indiana. It can thus be seen how, in a sense,

the Ordinance became the In-the-Beginning of the Indiana criminal code.

The English, the American colonial, and the early State penal codes of the last half of the last century and the first of the present, present most remarkable contrasts with the penal codes with which we, of today, are the best acquainted, particularly as respects the nature and character of the punishments inflicted for wrong-doing. There are other contrasts which, if one had the time, it might be interesting to point out, but not one so noticeable as the one suggested and which with such certainty indicates progress in the humanities.

In Professor Howard's *Introduction to the Local Constitutional History of the United States*,¹ he characterizes as "A Barbarous Criminal Code" the Marietta one of 1788; and it must be conceded that to a humane statesman of that era who could have seen with prophetic eye the criminal code of our day it would indeed have seemed all the Professor characterized it—a barbarous criminal code. But the men who framed that code and their contemporaries were very much in the habit of looking backward instead of forward, and so, looking backward and considering the penal codes of the past ages as well as of their own ages, they doubtless found cause for self-congratulation in the fact that the odds of humanity were in favor of their code.

At the risk of consuming time that may possibly be coveted before the end is reached, let me briefly call attention to the state of the criminal law, both in England and the colonies immediately preceding, at and succeeding the time when the Marietta code was promulgated. By so doing I trust we may not only be the better able to judge of the merits or demerits of that code but of the successive penal legislation of the Northwest up to and including the first distinctively penal code adopted by the State of Indiana.

There is always a disposition to judge of the men of the past and their deeds by the standards of the present. The history books are full of the instances of such judgments. Necessarily our outlook must be the most circumscribed. I call to the stand Robert McKenzie, the author of a *History of the Nineteenth Century* and I ask him to make a brief statement of the condition of the criminal law in England and the manner of their enforcement during the lat-

¹ George E. Howard, *An Introduction to the Local Constitutional History of the United States*. Johns Hopkins University Studies, Baltimore, 1889.

ter half of the Eighteenth century and, say, up to the year 1816, when Indiana was admitted. His answer you will find beginning on page 79 of his history:

The criminal laws were savage and they were administered in a spirit appropriately relentless. The feeling of the time was so entirely in favor of severity that Edmund Burke said he could obtain the assent of the House of Commons to any bill imposing the punishment of death. Every class strove to have the offenses which injured itself subjected to the same penalty. Our law recognized 223 capital offenses. Nor were these mainly the legacy of the Dark Ages, for 156 of them have no remoter age than the reigns of the Georges. It seems at first that there cannot be 223 actions worthy of the mildest censure. But our stern fathers found that many worthy of death. If a man injured Westminster bridge he was hanged. If he appeared disguised on a public road he was hanged. If he cut down young trees; if he stole property valued at five shillings; if he shot at rabbits; if he stole anything at all from a wheatfield; if he wrote a threatening letter to extort money; if he returned prematurely from transportation,—for any of these offences he was immediately hanged. The criminal class has become in recent times an embarrassment. Our fathers experienced no such difficulty. They solved the problem by putting to death with little discrimination every rogue, great or small, on whom they could lay their hands. . . . In 1816 there were at one time 58 persons under sentence of death. One of these was a child ten years of age. The hanging of little groups of men was of constant occurrence. Somewhat earlier it had been even worse. "A fortnight ago," wrote Charles Wesley in 1776, "I preached a condemned sermon to about 20 criminals; (and every one of them I had good ground to believe died penitent.) Twenty more must die next week." Men who were not old when the battle of Waterloo was fought were familiar with the nameless atrocities which it had been customary to inflict upon traitors. Within their recollection, men who resisted the government were cut to pieces by the common executioner and their dissevered heads were exposed on Temple Bar to the derision or pity of passersby. It seemed indeed as if society were reluctant to abandon these horrid practices. So late as 1820 when Thistlewood and his companions were executed for a poor, blundering conspiracy which they were supposed to have formed, the executioner first hanged and then beheaded the unfortunate men.

So much for this witness. He gives us a varied summing up of the condition of affairs in England. Unfortunately no witness is at hand with a like summing up as to our own country. But the story is a less bloody one. The colonial and the new State criminal codes were humane by the side of the mother country code, but barbarous by the side of the codes of the present. They provided punishment for acts which would not be tolerated now-a-days, and nearly or quite all of the graver offences were punishable with death. McMaster tells us that the General Court of Massachusetts prescribed

the death penalty for ten crimes in the very year of the adoption of the Federal Constitution.² In both Connecticut and Rhode Island death followed the commission of a like number of acts. In Delaware twenty offences were punishable capitally, and in Virginia and Kentucky twenty-four were punishable either by death or maiming.

In 1777 Mr. Jefferson, then a member of the Virginia House of Delegates, was appointed one of a committee of three to revise the laws and adapt them to the new condition of things.³ It fell to his lot to revise the criminal laws and the law of descents. Mr. Jefferson was a gentle, humane man and we may well suppose that a criminal code of his devising would fail, if fail it must, in the House of Delegates rather for its humanity than its inhumanity. And such was the fact. Mr. Jefferson's code was ahead of the times. "The general idea of the century," he himself says, "had not advanced to the point put forth by Beccaria⁴ on crimes and punishments, of the unrightfulness and inefficiency of the punishment by death." He reported a plan of a penal code which provided the penalty of death for two offenses only, treason and murder. I believe a vote was not had on the report till after the [Revolutionary] war when it was defeated by a majority of one. It was still in advance of the humanity of the times.

Now let us note some of the provisions of that too human code. Whosoever committeth death by poison shall suffer death by poison. The duelist who killed his antagonist was to be gibbeted—hung upon the gallows-tree till the birds picked his bones. Every murderer should forfeit half his goods to the next of kin of the person killed. Every man guilty of rape, polygamy, or sodomy was to be castrated and every woman have a hole cut through the cartilage of her nose a half inch in diameter. Every person who of malice aforethought should maim or disfigure another, cut out his tongue, slit or cut off his nose, lip or ear, or brand him, should be maimed or disfigured in like sort; and if he could not be maimed or disfigured in like sort for want of the same part then in some other part of equal value to be selected by the jury. Five years of hard labor was to be the part of counterfeitters and committers of arson. For grand larceny the pillory for half an hour and two years of hard labor on

² John Bach McMaster, *A History of the People of the United States*, I, p. 100 seq.

³ Jefferson, *Works*, Washington Edition, I, p. 45. The text of the proposed code is given on page 147.

⁴ Cesare Bonesano, Marquis of Beccaria, was a Milanese publicist (1735-1793). His fame rests on his great work published in 1764 entitled *Treatise on Crimes and Punishments*. He argued against capital punishment, and for greater humanity toward criminals.

the public works. For petit larceny the pillory for half an hour and one year hard labor. For all attempts to delude the people by the practice of pretended arts, such as witchcraft and the like, ducking and whipping.

This code shows in its very inequalities that it must have been the result of an attempt on the part of its author at practical legislation. He hoped that, while conceding something to the barbarism of the age, yet to compass something for the cause of humanity. The cruel punishments provided for came from the past; the more humane were the expressions of the new and better day whose dawn was apparent only to the few.

While the number of acts that one could commit in any of the colonies or States during the latter part of the last century that brought the penalty of death was far below the number in England at the same time, yet the severity, not to say ferocity, of all other punishments, save death, that were inflicted was little if any less than in England. The colonists had brought with them all the instruments of punishments then known and in use—the stocks, the ducking stool, the branding iron, the cropping knife, the whip, the jail, the rope, and even the wheel, the stake and the cage. In Massachusetts “breakers of the peace, profaners of the Sabbath, unlawful gamblers, drunkards and profane swearers or cursers” were put in the stocks, caged, imprisoned, or whipped.

In Connecticut from 1760 to the Revolution the burglar or robber was branded on the forehead with the letter “B,” had an ear nailed to a post and then cut off, was whipped on the naked body with fifteen stripes. For a second offense he was again branded, had the other ear cut off and got twenty-five stripes, and for the third offense was killed outright.

In Maryland he who unlawfully altered a will forfeited all his estate and was put in the pillory for two hours with both ears nailed there, which were cut off and left sticking to the timbers when his time was up.

In Delaware, New York, and probably elsewhere negroes were burned at the stake and sometimes with green wood so as to prolong the agony; they were broken on the wheel, and hung up in iron cages and left to starve to death. All these things occurred in New York, certainly before the Revolution, and probably after, and the like occurred probably in three-fourths of the other colonies but has never got into history. The Delaware case I discovered myself in running through some very old church records at the town

of Jersey in that State, and I have no doubt one could find many such instances in the time-stained court, parish, church, and other records of the original thirteen. These are the things the local historians as a rule do not care to talk about.

Professor George E. Howard, after writing 416 pages of his *Local Constitutional History of the United States*, in which he considers the town-meeting, the selectmen, the tithing, the township, the county, and divers other matters pertaining to New England, Pennsylvania, Maryland, and the other colonies gives us without any heading, three pages devoted to "various forms of corporal punishment, some of them rather peculiar, [which] were devoted to *petty* offenses"; and if his reader happens to know no better, he will rise from the perusal of these pages with the impression that the peculiar corporal punishments inflicted in New England were of rare occurrence, had a humorous flavor, and were confined to the very early years of colonial history. But when the author reaches the Northwest territory he becomes quite serious and heads a chapter "A Barbarous Criminal Code"—and tells the truth.

All this, however, is by the way. The code was a barbarous one, judged by the standard of today, but let us see whence it came and what became of it. The act of a Congress made up exclusively of members from the thirteen original States provided that the governor and territorial judges of the Northwest territory should, during the First Stage of territorial government, *select* from the codes of the original thirteen States such laws as they deemed applicable to the new government northwest of the Ohio. No authority was given for framing new laws, and while it is a fact that occasioned much congressional criticism at the time that the commission ventured to re-cast some of the laws in order to make them conform to the requirements of a new society, nevertheless the laws so re-cast were taken from the statute books of some of the original thirteen.

We therefore find the new law-proclaiming power handicapped at the very outset. Legally no laws for the punishment of crime could be enforced but such as had already been enacted by some State for the government of its own citizens; and so whatever of merit or demerit that attached to any particular law adopted, the legislators of the Northwest territory were entitled to neither the praise nor the blame. If their code appears to the people of this more favored age as a "barbarous one" it had in a sense been forced upon them by the older communities.

In eleven years the population of the Northwest territory had in-

creased to such a degree as to warrant the introduction of the Second Stage of territorial government which had been provided for by Congress and thereafter legislative assemblies composed of elected members passed such laws, whether belonging to the civil or criminal sides, as they deemed would best promote the interests of the people. The congressional injunction to *select* laws that were found in the codes of some one of the original thirteen States was not binding on these legislative assemblies.

Up to the time of the ending of the First Stage of the territorial government, the governor and judges were in the habit of meeting from time to time to *select* laws, an act they could rightfully perform, and to *pass* new laws, an act they could not rightly perform. Congress disapproved in 1792 of the territorial laws *passed* by the governor and judges, but it would seem as if the laws continued to be enforced among the people thereafter till repealed by territorial legislative act. The judges who had passed the laws stood ready to enforce them and from their decision there was no appeal, and Congress could only disapprove, not repeal.⁵

In 1800 the first division of the Northwest territory was made and the Indiana territory with jurisdiction over all the region now comprised within the States of Indiana, Michigan, Illinois and Wisconsin was created. Michigan territory was cut off in 1805 and Illinois in 1809, leaving the Indiana with [about] the same as the present boundaries of the State.

The unrepealed laws of the governor and judges and of the legislatures of the various territorial governments, descended as it were in a sort of lineal succession, till in 1816, when on the organization of the State government of Indiana the whole descended and became a part by inheritance, figuratively speaking, of the new State. It was in this way that Indiana as a State got her first criminal code.

It is thus made apparent, I trust, that in order to form a just judgment as to the presence or absence of wisdom or humanity in the Indiana criminal code in the beginning or at any subsequent time, something of the letter and the spirit of the various territorial codes that constituted it must necessarily be known.

Let us consider, then, some of the territorial criminal laws for a moment. The want of time utterly forbids any attempt at classifi-

⁵ Most of these laws can be found in the *Maxwell Code*, published by W. Maxwell, Cincinnati, 1796. The laws of this code were adopted by the Governor and Judges at Cincinnati May 29 to August 5, 1795. A *fac-simile* reprint of this Code was published by Robert Clarke & Co., Cincinnati, about twenty years ago.

cation or any other than the most meager reference. The Marietta code of 1788 provided penalties for nine acts and pronounced homilies against two. Treason, murder, and house-burning in case the death of any one was caused thereby, were punished by death. Burglary and robbery were punished by thirty-nine stripes and by fine and imprisonment not to exceed forty years. For perjury the offender was either to be fined not exceeding \$60 or whipped not exceeding thirty-nine lashes, disfranchised and put in the pillory. Larceny was punished by fine or whipping and if the accused were fined and unable to pay, it was lawful for the sheriff to sell him at public outcry for a period not exceeding seven years, to some one who would pay the fine. Forgery was punishable by fine, disfranchisement and standing in the pillory. For the first offense of drunkenness a fine of five dimes was imposed, for the second, and every successive, one dollar and in case of refusal to pay the fine, the stocks for an hour.

Against the vices of profanity and Sabbath-breaking the people were admonished that the acts were not made criminal by the imposition of any penalties. This was a unique sort of legislation that, so far as I know, was without precedent and has never become a precedent.

This code was a patchwork affair, as it needs must have been to have come from so many different sources as we may suppose it to have come. As to the number and character of acts that were to be punishable by the death penalty, it was doubtless the most humane code in the civilized world at the time. But as to punishment for offenses its promulgators did not deem worthy of death it merited from our standpoint at least the epithet of barbarous. All sorts of punishment were recognized except maiming. There was no cropping of ears, no striking off of hands or other members of the body, and not even any branding in that code. There is a sort of inequality of punishment apparent which is not surprising, considering the patchwork character of the laws. Forgery, for instance, was punishable by fine, disfranchisement and the pillory, while the burglar and robber might get thirty-nine lashes, a fine and forty years' imprisonment.

This code is more remarkable, if possible, for what it does not contain than for what it does. There is not an act of turbulence or injury to the person of another than is forbidden either by way of admonition or fine, save those of murder and robbery. The citizens of the new territory might fight, engage in riots, slit noses,

perpetrate mayhem, gamble, commit rape, but they must not get drunk, and they ought not to swear nor fail to keep the Sabbath.

Subsequent legislation added acts that were made criminal and of these two were deemed worthy of death—bigamy in 1803, and the second offense for horse stealing in 1805.

The legislation concerning horse stealing would make not an uninteresting chapter in the history of criminal jurisprudence in our State. By the law of 1805 the offender, for the first offense, was required to make full reparation to the owner—a punishment that has come down from the old Saxon laws; and he was to receive not less than fifty nor more than 200 lashes on his bare back, well laid on. If not a vigorous fellow he might collapse under the punishment, which if he did, it was deemed his fault or misfortune. If he survived and was proven guilty of a second offense of the same kind he was deemed worthy of death and was executed outright.

We can easily see what excuse could be given for the savage nature of the punishment for horse stealing and likewise can readily see how the legislators of the time could find excuse for providing extraordinary punishments for the act of altering a brand or mark of any cow, hog, or other beast running in the range. In 1806 for this offense branding in the left hand with a letter "T" was provided as a part of the punishment. But for no other act was this punishment ever inflicted in Indiana and not for long for altering marks.

The usual punishments were whipping, putting in the stocks, in the pillory, fines, imprisonment and disfranchisement. But disfranchisement meant more in general in the early days than it does now. It was a sort of un-citizenizing of a man—something somewhat analogous, I suspect, to the ancient practice of the church in unfrocking an unworthy priest. At any rate, for many crimes it was made a part of the punishment that the criminal should not only be rendered incapable of voting and holding any office of profit or trust, but be forever incapacitated for serving as a juror and testifying as a witness. He was thus placed under the ban of the law and under the constitution no executive clemency could ever afford him any relief. Once under the ban, always under the ban. These were the kinds of punishments known to the laws that entered into and became a part of the Indiana criminal code—a code that came into and formed the State code from the territorial code by operation of general rules of law. They were savage in comparison with the laws of a later date. But it is worthy of

remark that no ears were ever cropped in Indiana under either territorial or State laws; no hand was ever stricken off; no disfiguring of the person was ever tolerated, save in the one case of branding for the altering of a mark, which was the law for a short time only during the territorial period. No noses were ever slit or had holes bored in them, nor was a man ever castrated for the commission of a crime.

The State was admitted in 1816. The Legislature of 1817 made no other changes in the criminal laws that had descended from the territorial code, save as may have resulted by implication from the passage of new laws. A dozen or more new acts were passed, among which were acts to punish forgery, man-stealing, giving false certificates of manumission, dueling, incest, Sabbath-breaking and profane swearing. The two last statutes have come on down to the present with no great change of phraseology.

In all these last-named laws the drift is seen toward substituting fines for punishments, though the whipping post keeps its place. Thus the forger or defacer of a public record in addition to any number of stripes between ten and one hundred might be fined not exceeding \$2,000. The forger of a deed might be fined \$3,000 and receive the stripes. For man-stealing the penalty was a fine not less than \$500 and not over \$1,000 and disfranchisement. Dueling was always repressed with vigor in both territory and State. A territorial law required of every citizen when taking an oath of office to take a kind of test oath. He had to swear that he had never engaged in nor participated in a duel as a party, second, or friend; and to this was now added a penalty for going out of the State to fight, in a fine not less than \$100 nor more than \$2,000.

The second Legislature took up the subject of criminal legislation in earnest and passed an act to reduce all the acts and parts of acts then understood to be in force relating to crimes into one general act or code.⁶ This new act provided punishments for fifty-five acts that were declared to be misdemeanors or felonies. Of these four were declared to be worthy of death, viz.: treason, murder, rape, and carnal knowledge of a female child under ten years of age. The acts relating to bigamy and horse-stealing and making them punishable with death had, before the State was admitted, been repealed and so had the statute providing for branding with the letter "T" for altering marks.

⁶ *Laws of Indiana*, 1818, Ch. V.

The punishments recognized in this new code were hanging for the four capital crimes, flogging, fine, imprisonment, and disfranchisement. Thirteen of the more heinous were liable to punishment by stripes; sixteen could be imprisoned and all but ten or twelve could be fined. The want of jails accounts for the comparatively few crimes that were punishable by imprisonment, it has been said, and I think with truth; but the heavy fining, considering the scarcity of money and general poverty of the people, is astounding. For the crime of arson the penalty was stripes not exceeding 100 and a fine not exceeding \$20,000.

With one more reference let this half-finished paper conclude. One by one the old barbarous modes of punishment had been eliminated until the Indiana code contained but one that was considered at the time, and is still by many, as the last of the list—the whipping post. In every one of the thirty-one counties organized in the State up to 1820, the whipping post was planted and the laceration of the backs of both men and women was not only a possible occurrence, but in some we know was an actual fact. Great throngs, it was said, would assemble to witness the infliction of this punishment. As late as 1821 the sheriff of Switzerland county took Abraham Levi, who had been convicted of horse-stealing, and sentenced to forty lashes, to the stray pen in Vevay and, tying his wretched victim to a corner post and stripping his back to his waist, gave him the forty lashes with the new rawhide. “No mercy was shown by the official,” says the local historian. “The prisoner’s back was so lacerated that it was with difficulty room could be found for the last ten or fifteen stripes without striking in one of the stripes before inflicted.”

If we compare these early Indiana laws with the laws of a later period we wonder at the savagery displayed in them; but if we compare them with the laws of older States we have cause for greater wonder that the savagery should so soon disappear. In England the stocks were not to disappear till 1826 and the pillory not till 1830 and as late as 1874 flogging was still a recognized mode of punishment in that country. It was not till the year 1832 that there was any considerable amelioration of the English capital criminal code. Until that year horse-stealing, cattle-stealing, sheep-stealing, stealing from a dwelling house, and forgery were still capital offenses.

But the spirit of humanity was abroad in the earth. The voices

of Sir Samuel Romilly and Sir James Mackintosh⁷ were sounding from over the sea and the Indiana statesmen of 1820 heard. Early in that year by one act they made the whipping post an impossibility in their State thence on to the present. They established a State prison at Jeffersonville and since the day the governor by his proclamation announced it was ready for the reception of prisoners there has never been a flogging by sentence of law in Indiana.

It seems proper in closing this paper that something should be said as to the causes that led to this advance step taken so early in the history of Indiana. Such a discussion is necessarily more or less speculation and it will be enough, and especially in view of the time already consumed, for me merely to hint at what to my mind seem some of the most potent causes.

1. I have already hinted at the voices that were heard sounding from over the sea. That eminent lawyer, Sir Samuel Romilly, had already been on fire in the cause of this reform and on his death Sir James Mackintosh had proved himself his worthy successor in the same humane cause. Through the efforts of these men and others of their disciples, few in numbers at the first, but increasing as the years went, the English-speaking people the world over began to hear. It was the voice of humanity calling and a response went up from the men of the wilderness.

2. In the second place let me suggest that the religious and political sentiment predominating in the West tended to a larger humanity. That great religious awakening which came in from Tennessee and Kentucky with the beginning of this century and which soon spread all over the West and Southwest, was not without its influence. One of the most interesting features of that movement was the intense, not to say ferocious, warfare between the sects it engendered. But the battles fought were with tongue and pen and we of today are just beginning to see resultant good that the soldiers of the period doubtless never dreamed of. However else those hard-hitting ecclesiastical warriors may have disagreed, they were at one in asserting the doctrine of individual responsibility. Co-ordinated with their teachings was the political dogma of the equality of all men before the law. These were truths the preaching of which by preachers and politicians "the common people heard

⁷ Sir Samuel Romilly (1757-1818) was an English barrister and statesman. His fame as a reformer rests on his treatise *Observations on the Criminal Law of England*. London, 1810. Sir James Mackintosh (1765-1832) was an English philosopher, barrister and historian. He was professor of law and politics at Haileybury for many years. He wrote voluminously on political and legal topics.

gladly" and their evident effect was a widening of the area of human sympathies and a preparation of these people for the dawn that was to come.

3. In the third and last place, and to my mind the most important one of all, Indiana was favored in her early lawyers. In the pioneer bar of the State the men of learning and ability predominated. I need not stop to explain how this happened to be so. I assert it, leaving the proof to some other occasion.

These lawyers were not only dwellers on the hilltops who saw the rising sun while the men of the valley were yet in the twilight, but their very calling as criminal lawyers quickened their humanity. Every lash that cut into the quivering flesh of a culprit was felt more keenly by his late lawyer than most laymen can well imagine.

Now these lawyers took the place in public affairs their culture and intellectual strength warranted them in taking. They were the true moulders of our State's laws, and to their influence more than to all others I think we owe the abolition of the whipping post—the last of the old barbarous punishments, at so early a period in the history of our State.